

1 JEFF W. REISIG  
DISTRICT ATTORNEY  
2 By: GARRETT L. HAMILTON/173423  
Supervising Deputy District Attorney  
3 301 Second Street  
Woodland, CA 95695  
4 Telephone: (530) 666-8180  
D.A. File No.: 08H03355 reh  
5 Attorney for The People

FILED  
YOLO SUPERIOR COURT

OCT 02 2009

By

  
Deputy

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF YOLO

10 THE PEOPLE OF THE STATE  
11 OF CALIFORNIA,

12 Plaintiff,

13 v.

14 MARCO ANTONIO TOPETE,

15 Defendant.

No. 08-3355

PEOPLE'S OPPOSITION TO  
DEFENDANT'S MOTION TO SET  
ASIDE CIRCUMSTANCE C OF  
COUNT 1 AND COUNT 5 OF THE  
INDICTMENT (PC § 995)

Date: 11/6/09 Dept: 9  
Time: 8:30

17 TO THE HONORABLE JUDGE PAUL K. RICHARDSON, THE DEFENDANT MARCO  
18 ANTONIO TOPETE, AND HIS ATTORNEYS OF RECORD, HAYES H. GABLE III AND  
19 THOMAS A. PURTELL.

20 PLEASE TAKE NOTE that at the above time and place the People will move the court to deny  
21 the defendant's noticed 995 motion. The People's motion will be based on the following references  
22 to the transcript of the grand jury proceedings, points and authorities, and arguments.

23 STATEMENT OF THE CASE

24 The Indictment in this case contains an allegation pursuant to PC 190.2(a)(22), which is an  
25 enhancement alleged in Count 1. The Indictment also contains a charge of Penal Code Section  
26 186.22(a), which is a felony.

27 PC 190.2(a)(22) reads as follows: "The defendant intentionally killed the victim while the  
28

1 defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section  
2 186.22, and the murder was carried out to further the activities of the criminal street gang.”

3 CalCrim 736 reads as follows:

4 “The defendant is charged with the special circumstance of committing murder while an  
5 active participant in criminal street gang [in violation of Penal Code section  
6 190.2(a)(22)].

7 To Prove that this special circumstance is true, the People must prove that:

- 8 1. The defendant intentionally killed \_\_\_\_\_ <insert name of victim>;
- 9 2. At the same time of the killing, the defendant was an active participant in the  
10 criminal street gang;
- 11 3. The defendant knew that the members of the gang engage in or have  
12 engaged in a pattern of criminal gang activity;

13 AND

- 14 4. The murder was carried out to further the activities of the criminal street gang,

15 Active participation means involvement with a criminal street gang in a way that is more  
16 than passive or in name only.

17 [The People do not have to prove that the defendant devoted all or a substantial part  
18 of his time or efforts to the gang, or that he was an actual member of the gang.]”

19 PC 186.22(a) reads as follows:

20 “Any person who actively participates in any criminal street gang with knowledge that  
21 its members engage in or have engaged in a pattern of criminal street gang activity, and  
22 who willfully promotes, furthers, or assists in any felonious criminal conduct by members  
23 of that gang, shall be punished by imprisonment in a county jail for a period not to  
24 exceed one year, or by imprisonment in the state prison for 16 months, or two or three  
25 years.”

26 CalCrim 1400 reads as follows:

27 “The defendant is charged with participating in a criminal street gang [in violation of  
28 Penal Code section 186.22(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant actively participated in a criminal street gang;
2. When the defendant participated in the gang, he knew that members of the  
gang engage in or have engaged in a pattern of criminal gang activity;

AND

3. The defendant willfully assisted, furthered, or promoted felonious criminal  
conduct by members of the gang either by:

a. directly and actively committing a felony offense;

OR

b. aiding and abetting a felony offense.

1 Active participation means involvement with a criminal street gang in a way that is more  
2 than passive or in name only.

3 [The People do not have to prove that the defendant devoted all or a substantial part  
4 of his time or efforts to the gang, or that he was an actual member of the gang.]”

### 5 **STATEMENT OF FACTS**

6 The Grand Jury heard testimony that shortly before Marco Topete murdered Deputy  
7 Tony Diaz, he was associating with Norteño gang members in Woodland, and the same  
8 assault weapon he ultimately killed Deputy Diaz with was discharged at that location. This  
9 evidence was circumstantial, but compelling.

10 Officer Jameson from the Woodland Police Department testified about hearing shots  
11 [RT 30, lines 2-28]. He testified that he went to 17 and 13 Sunrise [RT 31, lines 1-5]. He  
12 detained a Mark Lopes at the scene, and noticed spent shell casings [RT 32, lines 1-20].  
13 Vehicles at that location were registered to Benito Fuentes[ RT 35, lines 14-16]. A nearby  
14 neighbor reluctantly testified in the Grand Jury that a light colored blue or grey Ford Taurus  
15 drove away from that shooting [RT 43, line 27 to RT 44,. line 4]. He later added that there  
16 was a baby seat in the car [RT 56, lines 22-24]. The shell casings from that scene were fired  
17 from the same rifle that killed Deputy Diaz, according to the DOJ firearms expert [RT 78,  
18 lines 15-17].

19 Sergeant Tom Davis testified by impeachment that the same neighbor had told him  
20 that he had seen the Ford Taurus about four times that day in the neighborhood, and that the  
21 driver of it was associating with a known Norteño gang member named Benito Fuentes [RT  
22 104, lines 19 to RT 106, line 20] A later witness testified that in fact there was a baby and  
23 a baby seat recovered from Topete’s car [RT 128, lines 9-26].

24 Woodland Police Detective Ron Cordova testified extensively in the Grand Jury  
25 about his training and experience with criminal street gangs, Norteño and related gangs, and  
26 Marco Topete’s history with these gangs. His testimony spanned approximately 27 pages.  
27 Detective Cordova’s gang expertise can be found at pages 188-192 in the Grand Jury  
28 Transcript [RT188-192]. He testified that felony assaults are “probably the most prominent  
activity on behalf of the Norteño gang” [RT196 at lines 17-18]. He testified about the

1 importance of violence against law enforcement officers by Norteño gang members [RT  
2 199, lines 9-27]. He testified about the foundation for that opinion [RT 200, line 1 to 28].  
3 He testified about why he believes Marco Topete was an active member in the Norteño  
4 gang for several pages of testimony [RT 203 to RT 213 line 6]. He acknowledged that one  
5 high ranking Norteño told him that Topete would not be welcomed back for committing this  
6 crime [RT 214 lines 2-6], but said other gang members would automatically elevated him in  
7 status based on this crime [RT 214 lines 6-13]. He also opined that the local effect of this  
8 murder of Deputy Diaz is being celebrated by Norteños in Woodland [RT 214, lines 14-  
9 18]. He testified that despite the one prison gang member who said that Topete would not  
10 be welcomed back for his crime, three other gang members told him that he would be  
11 welcomed back for his crime, and that the gang members train themselves to act in ways  
12 that Topete reacted [RT 215, lines 11-17]. Detective Cordova testified that Norteños who  
13 kill police officers are “respected to the highest ability of those around them. They are  
14 embraced by their gang for their actions”[RT 213, lines 20-23]

## 15 16 **POINTS AND AUTHORITIES**

### 17 18 **AN INDICTMENT MAY NOT BE SET ASIDE IF 19 THERE IS SOME EVIDENCE TO SUPPORT IT.**

20 The grand jury - like a magistrate deciding whether to bind a criminal defendant over  
21 to superior court - need only determine whether sufficient or probable cause exists to return  
22 an indictment. In other words, the grand jury need be convinced of merely such a state of  
23 facts as would lead a person of ordinary caution or prudence to believe and conscientiously  
24 entertain a strong suspicion of the guilt of the accused. (Cumiskey v. Superior Court  
25 (1992) 3 Cal.4th 1018, 1026-1027.)

26 Similarly, a motion to dismiss under Penal Code section 995, whether directed to an  
27 indictment or an information, is governed by a single standard. Essentially the superior court  
28 sits as a reviewing court. The court may not re-weigh the evidence or substitute its judgment

1 as to the weight of the evidence or credibility of witnesses for that of the grand jury. Nor  
2 does the court resolve factual contentions. (People v. Pic'l (1982) 31 Cal.3d 731, 737;  
3 Jackson v. Superior Court (1965) 62 Cal.2d 521, 530; Lewis v. Superior Court (1990)  
4 217 Cal.App.3d 379, 384.) "[I]f there is some evidence to support the indictment, the  
5 courts will not inquire into its sufficiency." (Somers v. Superior Court (1973) 32  
6 Cal.App.3d 961, 963; Jackson v. Superior Court, supra, at p. 525.)

7       Although there must be some showing as to the existence of each element of the  
8 charged crime, such a showing may be made by means of circumstantial evidence supportive  
9 of reasonable inferences. (Williams v. Superior Court (1969) 71 Cal.2d 1144, 1148.)  
10 Indeed, every legitimate inference that may be drawn from the evidence must be drawn in  
11 favor of the indictment. (Jackson v. Superior Court, supra, 62 Cal.2d at p. 530; People v.  
12 Shirley (1978) 78 Cal.App.3d 424, 431.) In short, an indictment should not be set aside  
13 under Penal Code section 995 if there is some rational ground for assuming the possibility  
14 that an offense has been committed and the accused is guilty of it. (Cummiskey v. Superior  
15 Court, supra; People v. Pic'l, supra; Somers v. Superior Court, supra; Bompensiero v.  
16 Superior Court (1955) 44 Cal.2d 178, 183-184.)

## 19                                   ARGUMENTS

20       The defense cites the Albarran case[149 Cal.App.4th 214] in support of its motion  
21 to strike the PC 190(a)(22) allegation. One problem with using that case is that the PC  
22 186.22(b)(1) enhancements that were the subject of the Albarran case are not charged in  
23 this case.

24       The gang charges in this case have different elements. One could argue that element  
25 4 of the special circumstance is similar to the elements of the 186.22(b)(1) enhancement in  
26 Albarran, but even so it requires a lot less to prove than a 186.22(b)(1) enhancement. Even  
27 if we were to pretend they were the same for the sake of doing the analysis, this Grand Jury  
28 heard that within an hour or so of killing Deputy Diaz, this defendant was with other gang

1 members at a location where this assault weapon was fired. They heard that he was wearing  
2 the colors of his gang, and they heard an expert opinion that this gang specifically is known  
3 for major assaults on police officers, and backed that up with specific conversations with  
4 Norteño affiliated gang members. One could argue that element 3 of the PC 186.22(a) is  
5 similar to the elements of a 186.22(b)(1) enhancement charged in Albarran and do the same  
6 analysis. The facts of Albarran and the holding in Albarran should not defeat the  
7 PC186.22(a) enhancement in this case on this motion for the same reason. The Grand Jury  
8 heard testimony about the shooting in Woodland and his gang colors and the Norteño gang's  
9 known preference for violence against police officers.

10         The defense cites People v. Ramon (2009) 96 Cal.Rptr.3d 459 in support of its  
11 motion. That case also dealt with PC 186.22(b)(1), not the gang charges in this case. Even if  
12 we pretend that the charges are the same, the case is easily distinguished from this case. The  
13 majority wrote that their analysis might not even apply to a case where the charged crimes  
14 were "one of the activities of the gang" [Ibid, at page 466]. In this case, we have expert  
15 testimony that felony assaults are prominent activities of the gang, and that specifically  
16 murdering police officers is one of the things that the Norteño gang is known for. The expert  
17 testimony in that case was quite different than that in the Grand Jury in this case. In the  
18 Ramon case, the gang expert gave opinions on how the crimes could be used to commit  
19 more crimes, rather than giving evidence of how the charged crimes were for the benefit of  
20 the gang. The case presents an interesting example of how not to conduct a direct  
21 examination of a gang expert, but should have no weight in this court's decision on this  
22 motion.

23         The defense cites In re Frank S. (2006) 141 Cal.App.4th 1192 in support of its  
24 motion. That case also dealt with PC 186.22(b)(1), as opposed to the charged crimes in this  
25 case. Even if we were to pretend otherwise and analyze the applicability of its holding to the  
26 present case, it should hold no weight. The crime charged in that case was illegal possession  
27 of a knife, and there was apparently no testimony that illegal knife possession is a primary  
28

1 activity of the Norteños. In this case, to the contrary, we have expert testimony that felony  
2 assaults are the primary activity of Norteños, and specifically that murder of police officers is  
3 something they are now known for.

4 The defense cites People v. Killebrew (2002)103 Cal.App.4th 644, in support of its  
5 motion. That case also dealt with the PC 186.22(b)(1) charge, not the ones in this case.  
6 Outside of gang members being the charged defendants, the cases hardly resemble each  
7 other. The gang expert opinion complained about in that case dealt with whether gang  
8 members traveling in different cars than gang members with guns would know whether the  
9 gang members in the other cars had firearms with them. That case for the above reasons  
10 should have no weight here.

11 In section III of its 995 motion the defense lays out the elements of the PC  
12 186.22(b)(1) enhancement, which is not charged in this case. It then cites People v.  
13 Margarejo (2008) 162 Cal.App.4th 102, and attempts to distinguish its applicability to the  
14 present case. The case is an interesting read. In finding that there was sufficient evidence for  
15 the gang enhancements, the court noted the remarkable amount of gang evidence in the case.  
16 “It is remarkable for a person in a high speed chase to make gang signs to pedestrians and  
17 the *to the police*” [Ibid at 109]. “Margarejo conspicuously proclaimed his gang under  
18 startling circumstances. His efforts to communicate were continuous and systematic. The jury  
19 was entitled to find he had turned this pursuit into a reckless and attention-getting parade,  
20 and the parade into a gang crime” [Ibid, at page 110]. The court did not suggest that any  
21 case would require the level of evidence present in their case to be sufficient to sustain a  
22 186.22(b)(1) enhancement.

23 The defense concludes in its motion with citations to dicta in People v. Morales  
24 (2003) 112 Cal. App.4th 1176. The cited language is dicta analyzing a gang charge that is  
25 not charged in this case.  
26

27 There is no case published in California that holds that one gang member, acting  
28 alone, is incapable of violating PC 190.2(a)(22) or PC 186.22(a), which are the charged

1 gang crimes in this case. There aren't even any published cases which hold that one gang  
2 member acting alone is incapable of violating PC186.22(b)(1), which is of course not  
3 charged in this case.

4 A 995 motion is a motion that gives limited power of review to the reviewing court.  
5 That case law is cited above. This gang member, Marco Topete, was wearing the colors of  
6 his gang when he committed this crime, was associating with his own gang members right  
7 before this crime which involved the criminal possession of an assault weapon, and later  
8 committed a crime which despite its incredible severity, is a crime which his gang is known  
9 for. Based on the testimony in the Grand Jury, the legal standard applicable to a 995 motion,  
10 and the cited cases, this motion should be denied.

11  
12 DATED: October 2, 2009

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14  
15 Respectfully submitted,

16 JEFF W. REISIG  
17 DISTRICT ATTORNEY

18  
19 BY: 

20 GARRETT HAMILTON  
21 Supervising Deputy District Attorney  
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PROOF OF SERVICE

I, RACHEL HUNTER, declare:

I am a citizen of the United States and a resident of the County of Yolo; I am over the age of eighteen years and not a party to the within entitled action; my business address is 301 Second Street, Woodland, California 95695.

On October 2, 2009, I served the within document: **PEOPLE'S  
OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE  
CIRCUMSTANCE C OF COUNT 1 AND COUNT 5 OF THE  
INDICTMENT (PC § 995)**

- ☐ by placing a true copy thereof in the box located at 301 Second Street, Woodland and clearly designated for daily pick-up by:
- ☐ by transmitting via facsimile the document listed above on this date before 5:00 pm. to fax number:
- ☐ by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Woodland, California, addressed as follows:
- ☒ (XX) by placing a true copy of the above document in a sealed envelope and deposited the same at the Yolo County Mail Room for posting this business day, in the United States mail at Woodland, California, addressed as follows:

Hayes Gable III  
Attorney at Law  
428 J St, Ste 354  
Sacramento, CA 95814

Thomas Purtell  
Attorney at Law  
430 3rd St  
Woodland, CA 95695

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on October 2, 2009 at Woodland, California.

  
\_\_\_\_\_  
RACHEL HUNTER